

State of California

Department of Education

# LAST MINUTE MEMORANDUM

**DATE:** July 7, 2004

**TO:** MEMBERS, STATE BOARD OF EDUCATION

**FROM:** Sue Stickel, Deputy Superintendent  
Curriculum and Instruction

**RE:** Item No. 15

**SUBJECT:** *No Child Left Behind (NCLB) Act of 2001: Title IX Persistently Dangerous Public Elementary and Secondary Schools: Adopt Title 5 Regulations*

The due date for collection of data for the possible designation of a school as “persistently dangerous” per State Board policy has passed. Although all data is not in, no school that was “at risk” in the last two years met the criteria in 2003-04, so no school will be designated as persistently dangerous for 2004-05.

The public comment period for proposed regulations, for designating a school as persistently dangerous has ended. As a result of public comment, CDE staff are proposing a number of clarifications.

Attached are two documents. The first is a summary of the comments received in response to the *Notice of Proposed Rulemaking for Defining Persistently Dangerous Public Elementary and Secondary Schools*. The summary also includes CDE staff comments regarding whether to make revisions to the proposed regulations as a result of the public input. The second document is a revised set of proposed regulations including those revisions that CDE staff recommends that the Board accept. The revisions are in “strike-out” or are in bold font. If the Board approves these proposed regulations, CDE staff will conduct another public comment period to allow comments on the latest version.

[Attachment 1](#): Issues from the Public Comment Period for Proposed Rulemaking for Defining Persistently Dangerous Public Elementary and Secondary Schools (3 Pages)

[Attachment 2](#): Revised set of proposed regulations (4 Pages)

## **ISSUES FROM THE PUBLIC COMMENT PERIOD FOR PROPOSED RULEMAKING FOR DEFINING PERSISTENTLY DANGEROUS SCHOOLS**

### **MAJOR ISSUES**

#### **Comments from the Children's Advocacy Institute:**

1. The Institute expressed concern that there should also be regulations regarding the Unsafe School Choice Option and a plan to improve the safety of the site.
2. The Institute expressed concern that the regulations won't successfully identify the dangerous schools, or won't identify many of them.
3. Why not count incidents rather than expulsions?

#### **Staff response:**

- Comment 1. The Board and the CDE have thus far dealt with this issue by notifying LEAs of federal requirements and by requiring, via the consolidated application, an assurance of compliance with those requirements. The CDE notified the U.S. Department of Education (USDE) about this process and USDE has not disapproved. There will be a federal audit of California's process beginning July 12. At the end of this audit it will be clear if additional regulations should be established to implement the Unsafe School Choice Option.
- Comment 2. This is the sole comment of this nature, which the CDE received. Given that a field advisory panel, the State Board, and the Department developed this definition, staff considers this definition as encompassing as it can be for the 9,000 plus schools in California.
- Comment 3. The collection of data on 'incidents' rather than 'disciplinary actions' would require the development of an additional data collection process similar to the prior *California Safe Schools Assessment*. The data used for the current "persistently dangerous schools" (PDS) definition is already required to be collected by Title IV of NCLB regardless of how PDS is defined. It will be much easier and less expensive for schools to use existing data rather than to develop an additional system.

#### **Comments from Elk Grove Unified School District (EGUSD) and Riverside County Schools Advocacy Association (RCSAA):**

These two entities had essentially identical comments. Therefore, the CDE combined their respective comments and quoted those submitted by RCSAA.

1. The proposed regulations create a disincentive for schools to expel students for certain violations and disproportionately impact those districts that exercise zero tolerance policies. The proposed regulations would use expulsion data for both mandatory expulsions and those that are left to local discretion, as the primary

identifier of “dangerous” schools. Accordingly, those districts that choose to employ zero tolerance policies will be more likely to be identified as “dangerous” than those that experience the same number and kinds of incidents but choose to provide other interventions in lieu of expulsion.

2. The state’s definition of battery is so broad that using it as an indicator of level of “danger” on a school campus is misleading.
3. Differences in local law enforcement reporting will provide misleading information as to the relative number of incidences of non-student gun violence among schools.
4. Ambiguous language in the proposed regulations will lead to inaccurate reporting of the kinds and levels of dangerous incidences on campuses.
5. The regulations do not provide clear definitions for a number of key terms, including: “during school hours,” “school sponsored events” (sic; the regulations actually use the word “activities”), and “on school grounds.”

The RCSAA concludes with the statement, “We believe the current proposal needs significant refinement and should not be approved as drafted. We strongly urge the Board defer action on these regulations until these issues can be appropriately addressed.”

### **Staff Response**

- Comment 1. This is a valid issue, but similar issues would hold for any data collection system using discipline data. Further, discipline data is the only type of data, which is already available at no additional cost to schools (Title IV of *NCLB* requires reporting of suspension and expulsion data regardless of how a state defines persistently dangerous schools.) Alternative data collection systems that do not use expulsion data would require additional reporting from LEAs and would result in mandate cost claims.
- Comment 2. The comment related to the broad definition of “battery” is based on a misunderstanding. Both EGUSD and RCSAA identify that a large number of student-on-student incidents that might or might not fall into the PDS definition. However, battery is only relevant to PDS when it is battery on a school employee. Staff and the LEA Advisory Committee on PDS believe that any battery on a school employee would be significant and should be counted.
- Comment 3. Law enforcement reporting is not particularly an issue, as school administration would almost always be aware of a non-student gun incident. School staff would likely have initially notified the police. Variations in statistics resulting from different reporting practices, if any, of law enforcement would not have an important effect on a school’s PDS designation.
- Comment 4. Staff concurs. However, by adding the word “firearm” in Section 11992(c), possible reporting variations are eliminated. The CDE acknowledges that the omission of the word does cause confusion, and recommends that the word “firearm” be added.
- Comment 5. Staff concurs that “during school hours,” “school sponsored activities,” and “on school grounds” should be defined.

**Comments from the CDE Legal Office:**

1. The Office suggests that the State Board may wish to delegate task of officially naming a school as persistently dangerous to CDE.

**Staff Response**

Comment 1. Staff concurs. Given that the Board has defined a persistently dangerous school based on strictly objective criteria, CDE can easily identify those schools that meet the criteria.

**LESSER ISSUES**

Informal comments from other members of the public and the CDE raised the following issues:

1. What is the meaning of “incident” when used with respect to a non-student firearm violation?
2. The definition of “enrolled student” was unclear.
3. Why not count other violations by non-students?
4. There was a typographical error in line 4 of page 2.
5. The language in 11992(c), regarding a student who cannot otherwise be expelled, is confusing.

**Staff Response**

Comment 1. A definition was added to Section 11993

Comment 2. An unclear and unneeded definition was deleted from Section 11993

Comment 3. The LEA advisory committee specifically addressed this question, and decided that, among non-student violations, only gun violations are a significant indicator of danger at a school site.

Comment 4. Corrected.

Comment 5. The language was revised.

**Title 5. EDUCATION**

**Division 1. State Department of Education**

**Chapter 11. Special Programs**

*Add Subchapter 23, Sections 11992, 11993, and 11994 to read:*

**Subchapter 23. Defining Persistently Dangerous Public Elementary and  
Secondary Schools**

**§ 11992. Provisions.**

(a) A California public elementary or secondary school is “persistently dangerous” if, in each of three consecutive fiscal years, one of the following criteria has been met:

(1) For a school of fewer than 300 enrolled students, the number of incidents of firearm violations committed by non-students on school grounds during school hours or during a school-sponsored activity, plus the number of student expulsions for any of the violations delineated in subsection (b), is greater than three:

(2) For a larger school, the number of incidents of firearm violations committed by non-students on school grounds during school hours or during a school-sponsored activity, plus the number of student expulsions for any of the violations delineated in subsection (b) is greater than one per 100 enrolled students or a fraction thereof.

(b) Applicable violations include:

(1) Assault or battery upon a school employee (Education Code Section 48915(a)(5));

(2) Brandishing a knife (Section Education Code Section 48915(c)(2));

(3) Causing serious physical injury to another person, except in self-defense (Education Code Section 48915(a)(1));

(4) Hate violence (Education Code Section 48900.3);

(5) Possessing, selling or furnishing a firearm (Education Code Section 48915(c)(1));

- 1 (6) Possession of an explosive (Education Code Section 48915(c)(5));  
2 (7) Robbery or extortion (Education Code Section 48915(a)(4));  
3 (8) Selling a controlled substance (Education Code Section 48915(c)(3)); and  
4 (9) Sexual assault or sexual battery (Education Code Section 48915(c)(4)).

5 (c) In instances where a student has committed a **firearm** violation in  
6 subsection (b), but **is no longer a member of the school and** cannot otherwise  
7 be expelled, that violation must be reported as a non-student firearm violation.

8 NOTE: Authority cited: Section 33031, Education Code; Reference: Sections  
9 48900.3, 48915(a)(1), 48915(a)(4), 48915(a)(5), 48915(c)(1), 48915(c)(2),  
10 48915(c)(3), 48915(c)(4), and 48915(c)(5), Education Code; Public Law 107-110,  
11 Title IX, Part E, Subpart 2, Section 9532; 20 USC Section 7911.

12  
13 **§ 11993. Definitions.**

14 (a) "Fiscal year" means the period of July 1 through June 30 (California  
15 Education Code Section 37200).

16 (b) "Non-student" means a person, regardless of age, not enrolled in the school  
17 or program reporting the violation.

18 (c) "Firearm" means handgun, rifle, shotgun or other type of firearm (Section  
19 921(a) of Title 18, United States Code).

20 (d) "Firearm violation" means unlawfully bringing or possessing a firearm, as  
21 defined in subsection (c), on school grounds or during a school-sponsored activity.

22 (e) "Expulsion" means an expulsion ordered by the local educational agency's  
23 governing board regardless of whether it is suspended or modified.

24 (f) "Assault" means an unlawful attempt, coupled with a present ability, to  
25 commit a violent injury on the person of another (California Penal Code Section  
26 240).

27 (g) "Battery" means any willful and unlawful use of force or violence upon the  
28 person of another (California Penal Code sections 242 and 243).

29 (h) "Knife" means any dirk, dagger, or other weapon with a fixed, sharpened  
30 blade fitted primarily for stabbing, a weapon with a blade fitted primarily for

1 stabbing, a weapon with a blade longer than 3 ½ inches, a folding knife with a  
2 blade that locks into place, or a razor with an unguarded blade.

3 (i) “Serious physical injury” means serious physical impairments of physical  
4 condition, such as loss of consciousness, concussion, bone fracture, protracted  
5 loss or impairment of function of any bodily member or organ, a wound requiring  
6 extensive suturing, and serious disfigurement (this is the same definition as  
7 described in “serious bodily injury” in California Penal Code Section 243(f)(4)).

8 (j) “Hate violence” means any act punishable under California Penal Code  
9 sections 422.6, 422.7, and 422.75).

10 (k) “Explosive” means a destructive device (Title 18, Section 921, United States  
11 Code).

12 (l) “Robbery” means acts described in California Penal Code sections 211 and  
13 212.

14 (m) “Extortion” means acts described in California Penal Code sections 71, 518,  
15 and 519.

16 (n) “Controlled substance” means drugs and other substances listed in Chapter  
17 2 of Division 10 of the California Health and Safety Code (commencing with  
18 Section 11053).

19 (o) “Sexual assault” means acts defined in California Penal Code sections 261,  
20 266(c), 286, 288, 288(a), and 289.

21 (p) “Sexual battery” means acts defined in California Penal Code Section 243.4.

22 **(q) With respect to a non-student gun violation, “during school hours”**  
23 **means from the initial school bell to the closing school bell.**

24 **(r) A “school sponsored activity” means any event supervised by school**  
25 **staff at which students are present.**

26 **(s) “On school grounds” means the immediate area surrounding the**  
27 **school including, but not limited to, the school building, the gymnasium,**  
28 **athletic fields, and the site parking lots.**

29 **(t) An “incident” of a firearm violation by non-student(s) for the purpose of**  
30 **Section 11992 is an event on school grounds or at a school-sponsored**

1 activity involving a person or persons not enrolled in the school who  
2 unlawfully brings or possesses a handgun, rifle, shotgun, or other type of  
3 firearm. An event shall be counted as a single incident when it happens at the  
4 same time in the same location, regardless of the number of non-students  
5 involved. School site administrators or designees are responsible for  
6 documenting the incident and reporting the incident to the school staff who  
7 are responsible for reporting expulsion data.

8 NOTE: Authority cited: Section 33031, Education Code; Reference: Sections  
9 37200 and 48915(g), Education Code; Sections 11053–11058, Health and Safety  
10 Code; Sections 71, 211, 212, 240, 242, 243, 243(f)(4), 243.4, 261, 266(c), 286,  
11 288, 288(a), 289, 422.6, 422.7, 422.75, 518, and 519, Penal Code; 18 USC  
12 Section 921; Public Law 107-110, Title IX, Part E, Subpart 2, Section 9532; 20  
13 USC Section 7911.

14  
15 **§ 11994. Data Collection.**

16 Local educational agencies will submit to the California Department of  
17 Education the number of incidents of non-student firearm violations and student  
18 expulsion violations specified in Section 11992 above for determining persistently  
19 dangerous schools. The California Department of Education will use the  
20 information collected to recommend the names of schools that meet the criteria to  
21 the California State Board of Education for designation as persistently dangerous.

22 NOTE: Authority cited: Section 33031, Education Code; Reference: Public Law  
23 107-110, Title IX, Part E, Subpart 2, Section 9532; 20 USC Section 7911.

24 **6-07-04**